No.....

IN THE

# United States Circuit Court of Appeals

## FOR THE NINTH CIRCUIT

WILLIAM I. PHILLIPS,

*Appellant,*

vs.

MANUFACTURERS TRUST COMPANY, a Corporation, and Alexander LEWIS,

*Appellees.*

## BRIEF OF APPELLANT.

*Upon Appeal from the District Court of the United States, in and for the District of Idaho, Southern Division.*

HON. CHARLES C. CAVANAH, *Judge*

S. T. SCHREIBER and
ALFRED FRASER,
Attorneys for Appellant,
Residence: Boise, Idaho.

.....Clerk.

Filed.....

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## STATEMENT.

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This is an appeal from an Order or Judgment of Dismissal, (Tr. 134), made on the 13th day of June, 1938 in the United States District Court for the District of Idaho, Southern Division.

The case was originally brought in the District Court of the Third Judicial District in the State of Idaho, in Ada County at Boise, on the 8th day of February, 1937, and is an action in fraud, by reason of wrongfully and fraudulently leasing and optioning for sale, certain mining and mineral property in Gem County, Idaho, known

as the LINCOLN MINES, to the appellant, by one, Alexander Lewis of New York, who was not, and never has been the owner of said property (Tr. 1-2-3-4-and 5).

It is also alleged that a corporation engaged in general business and banking in New York City, State of New York, to wit: The Manufacturers Trust Company, a foreign corporation, doing business in the State of Idaho, is the true and lawful owner of the said property and is joint defendant, and at all times was and is the owner, and doing business in the State of Idaho without complying with the laws of the State, relative to foreign corporations doing business in the State.

The appellant alleges that he made large expenditures and improvements upon said property, and purchased machinery and mining equipment and placed thereon to mine the premises, did pay out sums of money as royalties on the productions of the mine to the said Alexander Lewis, and the said Alexander Lewis, with knowledge, acquiescence, and assistance of the officers and agents of the Manufacturers Trust Company, collusively and fraudulently withheld the true state of title from the plaintiff until approximately February 15, 1934, when plaintiff discovered to his surprise that the said Alexander Lewis was not the real owner, did not have the title and could not make title to plaintiff in any event, and at which time the agents, officers, and attorneys of the said Manufacturers Trust Company, a corporation, informed plaintiff that they would not convey said property to him, and demanded that he forthwith deliver up possession, to his damage in

the sum of approximately Five Hundred Thousand Dollars, ($500,000.00).

Service upon the defendant, Manufacturers Trust Company, a corporation, was obtained through the service of summons and complaint upon the Auditors of Ada and Gem Counties, Idaho, respectively, (Tr. 7-8-9-10-and 11; and acknowledged by the Vice President of said service (Tr. 11) is in evidence. The service on Alexander Lewis was obtained subsequently by registered mail, (Tr. 38 and 39).

On the 27th day of February, 1937, one day before the expiration of time for appearance, the defendant, Manufacturers Trust Company, through its Attorneys, served and filed a Notice, (Tr. 12 and 13), and a *Motion to quash* (Tr. 19-20-and 21) *the Summons and Complaint*, accompanying said motion with a Petition (Tr. 13-14-15-and 16), and a Bond for Removal (Tr. 17-18-19) to the Federal District Court of the United States in the Southern District of Idaho, Southern Division, at Boise. The notice to the plaintiff was, that the matter be presented on March 4, at ten A. M. or as soon as counsel may be heard by the Honorable Charles F. Koelsch, Judge of said Court, and prayed for an order approving said bonds, and removing said cause to the District Court of the United States.

The appellant filed his Objection to Allowance for Removal (Tr. 22) and supported the same by Affidavits, (Tr. 23-24-25), and on the hearings, March 4, Appellees

filed counter Affidavits (Tr. 26-27-28) and after argument by respective counsel upon the Motion to Quash and the Objections to Removal (Tr. 29) and as by Minutes of the Court (Tr. 28-30) is shown, the case, nevertheless, was removed on the 18th day of March, 1937.

MOTION TO REMAND.—

On March 30, 1937, the appellant filed a motion to remand the cause to the State Court, which motion is set out in the record, (Tr. 31-32-33). The motion was supported by Affidavits of James Baxter, President and General Manager of the Baxter Foundary and Machine Works, Fermin J. Arnould, an employee of the Baxter Foundary and Machine Works, J. W. Crowe, Division Manager of the Idaho Power Company at Boise, (Tr. 34-35-36-&-37) and the Affidavit of Truman Joiner, Certified Public Accountant at Boise, Idaho, (Tr. 40-41), and on the same day the Affidavit of Service obtained upon Alexander Lewis, through the Auditor of Gem County, (Tr. 38 & 39).

On April 14, 1937, the said cause upon the motion to remand, came on for hearing, (Tr. 42), and on April 15, 1937, after said hearing before the court, appellees filed a GENERAL POWER OF ATTORNEY, amending the Bond filed in the State Court, (Tr. 43-44-45-46), and on April 16, 1937, the court denied said motion to remand (Tr. 46), to which Appellant filed Exceptions, (Tr. 47), and on April 22, 1937, the same were allowed; subsequently, on April 27, 1937, upon notice by appellant, RENEWAL OF MOTION TO REMAND TO THE

STATE COURT, (Tr. 49), was filed, supported by the Affidavit by counsel for plaintiff-appellant, (Tr. 50-51), and on May 4, 1937, after same had been presented, by counsel for appellant and argued by counsel for respective parties, the court denied the motion (Tr. 52), and appellant filed his Bill of Exceptions, and the same was allowed by the Court on May 10, 1937, (Tr. 52-53).

On June 2, 1937, and more than thirty days having elapsed after the removal from the State Court, and no AFFIDAVIT OF MERITS OF DEFENSE, and no pleadings, answer or demurrer having been filed since the removal, the appellant filed his Praecipe for Default, (Tr. 53), and on the same day the Default of the defendants-appellees, was entered by the Clerk, (Tr. 52-54), and on July 6, 1937, appellant filed his motion to make the Default final, (Tr. 54-55).

No further action was taken in said cause until August 6, 1937, when the defendants-appellees, filed separate motions for the Manufacturers Trust Company and Alexander Lewis, respectively, to set aside the default, (Tr. 55-56-57-58-59-60-61-62-63-& 64), as is fully set out.

On September 13, 1937, the Motions to set aside the Default of the Manufacturers Trust Company and Alexander Lewis were presented to the Court by O. W. Worthwine, Esq. of Hawley & Worthwine, on the part of the defendants-appellees, and S. T. Schreiber, Esq. on the part of the plaintiff-appellant; and on September 30, the

said matter was further presented by respective counsel (Tr. 65-66), and the matter in all things was taken under advisement by the Court, and on October 5, 1937, the said court rendered its opinion and made an *Order vacating and setting aside the Default against defendants-appellees,* and second, *quashed the Service of Summons and Complaint, therein.*

On October 5, 1937, upon rendering its opinion, the Court further erred in the quashing of the Service of Summons and Complaint, in inferentially holding the action as a *separable controversy, and quashing the Summons and Complaint against both appellees.* Appellant, therefore, reserves his exceptions and filed the same as of October 20, 1937, and on October 21, filed his Notice and Motion to Reconsider Order Overruling Motion to Remand, (Tr. 74-75-76), supported by the affidavit of Robert W. Clark, (Tr. 77-78-79), and on January 5, 1938, the Motion for Reconsideration of the overruling of appellant's motion to remand, the case was heard before the court, and after argument by respective counsel for both parties, the court denied appellant's motion for Reconsideration, and again appellant reserved his exceptions to said rulings, and on January 7, 1938, appellant filed his exceptions to said rulings (Tr. 80-81) which were approved on said date. This left the case pending in the Federal Court for almost one year.

On February 7, 1938, the Clerk issued process from the Federal Court and again on February 8, 1938, another summons was issued by the Clerk of the Federal Court

upon an Order to Perfect Service, supported by an Affidavit, made by the Honorable Judge, C. C. Cavanah, (Tr. 86-87-88-&89), under the federal statute; and following on March 16, 1938, another summons was issued and served by the United States Marshal, (Tr. 90-91) upon the Auditor of Gem County, Idaho, as is shown by the return thereof, supported by the Affidavit of Lillian M. Campbell, Clerk of the District Court, Gem County, Idaho, (Tr. 91-92).

On March 23, 1938, appellee, Manufacturers Trust Co., by its Attorneys, Hawley & Worthwine, came into Court and filed a motion to quash service of summons and complaint which had been issued by the Clerk of the Federal Court upon Order, (Tr. 93-94) and on April 8, 1938, upon notice to the defendant-appellee's Attorneys, to determine Motion to quash service of Summons and Complaint, *and for a Default by reason of appellee's failure to answer or plead to the appellants complaint, and for want of a* sufficient affidavit of defense, were filed by appellant, as of April 8, 1938, (Tr. 96-97-98), and upon the affidavit of April 15, 1938 of William I. Phillips in Opposition to Motion to quash, (Tr. 100-101-102-103-&-105), and the affidavit of J. A. Jones, Auditor in the office of the office of the State Insurance Fund of the State of Idaho, (Tr. 105), and the Supplemental Motion, (Tr. 114-115-116-117-118), filed by the Manufacturers Trust Company as of April 16, 1938, and the Affidavit of Lester R. Bessell of New York, and James L. Fozard, of the same place, (Tr. 118-119-120-121-122-123-124-125), the pend-

ing motions were reset for hearing by the Court at 10:00 o'clock April 22, 1938, and upon the evidence submitted and the Exhibits to wit:—plaintiff-Appellant's death certificate of Alexander Lewis, (Tr. 99), and the deed, (Tr. 105-106-107-108-109-110), and the exhibit's Nos. 1, 2, 3, & 4, being the royalty checks of theAmerican Smelting & Refining Company, paid by Phillips to the defendants-appellees on the property, (Tr. 110-111-112-113), were introduced in evidence at the hearing, and at the conclusion of the arguments, the court took the motion to quash under advisement, but denied the motion for the entry of default; and on May 5, 1938 rendered opinion (Tr. 127-128-129), and ordered the motion of the Manufacturers Trust Company, a corporation, to quash the service of summons and complaint on it granted, to all of which rulings of the court, the appellant took exceptions and lodged the same on May 10, 1938, (Tr. 130-131), and on May 12, 1938, the court revised and approved the said exceptions, and the exceptions were filed on said date.

On June 11, 1938, motion to remand the case to the State Court was filed by counsel for appellant, (Tr. 132-133), based upon the records and files in the case, and the law in the particular case: *and on June* 13, 1938, *the case came up for final hearing.* The motion being presented by counsel for appellant, and after some argument, defendants-appellee were permitted by the Court to argue the case in opposition thereto, to which appellant's counsel objected; and on the self-same day, June 13, the court in harmony with its Memorandum Opinion, filed on May

5, upon the records and files, and the proofs heretofore presented, refused to remand the case to the State Court, but nevertheless, declared that it was without Federal Jurisdiction to proceed further with the case, and *ordered said case be dismissed with judgment for costs to the defendant-appellee, Manufacturers Trust Company,* (Tr. 134)—:

TO WHICH ORDER the plaintiff-appellant filed his Bill of Exceptions on June 21, 1938, (Tr. 135-136), praying that said Bill of Exceptions be signed, allowed and approved, and made a part of the record, pursuant to the rules and practice in such case, made and provided and which was accordingly done.

Upon oral notice of appeal, a proposed, compiled Bill of the Exceptions in said cause was fiiled on August 5, 1938, and presented to the Judge for settlement, and amendments and objections thereto having been filed by the defendants-appellees, the same was presented to the court for settlement and by the court denied, (Tr. 136-137-138).

The sections of the code particularly applicable to the case is Judicial Code 28, as amended, and 37, 28 U. S. C. A. 71, 80.

## ASSIGNMENTS OF ERROR.

1. That the Court erred in assuming jurisdiction of the cause in the first instance, on removal from the State Court to the Federal Court, and in denying the motion to remand.

2. The Court erred in his judgment of October 5th, 1937, in setting aside the default of defendant, Manufacturers Trust Company, and in quashing the service of summons and complaint in the action.

3. The Court further erred in denying the motion of plaintiff filed on the 11th, day of June, 1938, to remand said action to the State Court of the Third Judicial District of the State of Idaho, in and for Ada County from which it was removed for trial.

4. And the Court erred *in dismissing* the action on June 13, 1938 after the Statutes of Limitations, preventing the filing of a new action, had run, thereby depriving plaintiff of enforcing his demands against defendants.

5. And erred in rendering judgment for cost to defendants.

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## POINTS AND AUTHORITIES.

### I.

Where the bond for removal originally filed with the petition for removal, the latter being filed, in time, was defective and *was amended after the time for removal had expired,* the amendment was too late to effect removal.

Webb et al. vs. Southern Ry. Co., 248 Fed. 618
Wilcox & Gibbs etc., Sewing Mach. Co. vs. Follett et al, 29 Fed. Case No. 17, 643.

Alexandria National Bank vs. Willis C. Bates Co. 160 Fed. 839.

Lee vs. Continental Ins. Co. 292 Fed., 408.

Case would be remanded to State Court where case was removed to Federal Court, after defendant submitted case to State Court and secured adjudication on question of validity of service of process.

Chin vs. Foster-Milburn, 195 Fed., 161.
Bragdon vs. Perkins-Campbell, 82 Fed., 338.
Guernsey vs. Cross, 153 Fed, 827.
Seager vs. Maney, 13 Fed. Sup., 617.

Where application for removal of cause to said court was resisted, County Circuit Court could inspect record to determine whether the cause was removable.

In re: Law (1936) 186 A. 528.

State Court has right to pass on sufficiency of petition and bond for removal of cause to Federal Court, and cannot be deprived of jurisdiction unless they are sufficient under law.

Standard Oil Co. Inc. et al. vs. Decell, (1936), 166 Southern 379.

State Court has jurisdiction to determine questions of law raised by petition for removal, and in so doing, to construe in connection therewith plaintiff's pleadings.

Thompson vs. Pan-American Petroleum Corp., 169 S. E. 270.

Question of removability of cause from State to Federal Court is in first instance for State Court's determination.

Cyc. Fed. Pro., Vol. 1, Section 172.

McCarter vs. American Newspaper Guild, (1935) 177 Atl. 835.

Statutory requirement in respect to pleading within thirty days after filing certified record, applies only to party removing cause from State Court.

S. A. Lynch Enterprise Finance Corp. vs. Dulion, 45 Fed. 2d 6.

A State Court is not bound to surrender its jurisdiction of a suit on a petition for removal until a case has been made which on its face shows that the petitioner has a right to the transfer.

Wm. Stone vs. State of S. Carolina, 117 U. S. 430, 29 L. Ed., 962.

Removal cannot be effected unless all the parties of the controversy unite in the petition.

Hyde vs. Ruble 104 U. S. 497, 26 L. Ed. 823.

Chicago Rock Island & Pac. Ry. Co. vs. Martin, 178 U. S. 245, 44 L. Ed. 1055.

If the State Court had properly acquired jurisdiction in a method authorized by law (State Law) and not repugnant to the Federal Constitution or laws, or natural justice, the Federal Court on removal will recognize such jurisdiction and *the process by which it was obtained.*

Clark vs. Wells, 203 U. S., 164 51 L. Ed. 138.

Boise Flying Ser. Inc. vs. Gen. Motors Accept. Corp, 55 Idaho 5; 36 Pac. 2d. 813.

It was the State Court's duty to examine not only the pe-

tition, but the rest of the record in determing whether a sufficient case was presented for removal.

Missouri K. & T. Ry. Co. vs. Chappell, 206 Fed. 688.

The removal Statute cannot be so construed as to permit a defendant to oust the rightful authority of a State Court by removal, and then obtain a dismissal of the action in the Federal Court for want of jurisdiction.

Wells vs. Clark, 136 Fed., 462.

Where a non-resident defendant invokes the judgment of the State Court by motion to set aside the service of Summons and Complaint, he is concluded by the Court's decision and cannot renew the motion in the Federal Court.

Bragdon vs. Perkins-Campbell Co., (Supra).

Seager vs. Maney 13 Fed. Sup., 617.

A case involving but a single controversy cannot be removed.

Ex parte—Abraham Wisner, 203 U. S. 449.

*Foreign Corporation—Doing Business.*

By engaging in business within limits of States where such Statute is enforced, the Corporation will be regarded as thereby voluntarily submitting to the territorial jurisdiction of its court, subject only to the right of removal.

Lincoln Mine Oper. Co. vs. Manuf. Trust Co. et al, 17 Fed. Sup. 499.

Wade on Notice, Sec. 1303.

Ojus Mining Co. vs. Manuf. Trust Co. et al., 82 Fed. 2d. 74.

For a corporation to be doing business in a State sufficient to make it amenable to process of Court, all that is required is that enough business be done to enable the Court to say that corporation is present in the State.

I. C. A. 5-507 Sub. 3.

Boise Flying Ser. Inc. vs. Gen. Motors Accept. Corp. 55 Ida. 5.

A statutory provision against the acquisition and holding of real property by a foreign corporation, cannot be evaded by the property being conveyed to a trustee, or by purchasing the Charter and Franchise of a domestic corporation as a mere device to conceal the real ownership of property.

Fletcher Cyc., Sec. 8364.
U. S. vs. Forwarding Co. Ltd. et al., 8 Fed. Sup., 647..

There can be no question that a foreign corporation is suable in tort in a state in which it is doing business in which the tort was committed.

Fletcher Cyc. Sec. 8797.

Farmers & Merchants Bank of Cattleburg, Ky. vs. Fed. Reserve Bank in Cleveland, 286 Fed., 566.

Smolik vs. Pa. & R. Coal & Iron Co., 222 Fed., 148.

Again the mere agent of such foreign corporation cannot be permitted to take title in himself to the use and benefit of such corporation. Such transaction would be palpable evasion of the statutes.

Donaldson vs. Thousand Springs Co., et al. 29 Ida. 735 162 Pac. 334.

See:—Re-statement of the Law of Agency, Vol. 1, Page 569.

II.

PLEADING SUBSEQUENT TO REMOVAL:—

The said copy of the transcript being entered in the United States District Court within thirty days, the parties so removing said cause, shall within thirty days thereafter, plead, answer or demur to declaration or complaint in said cause, and the cause shall then proceed in the same manned as if originally commenced in the Federal Court.

Jud. Code Sec. 29 (Compiled Statutes 1011.)

Wena Lumber Co. vs. Continental Lumber Co. 270 Fed. 795.

Virginia Bridge & Iron Co. vs. U. S. Shipping Board Emg. Fleet Corp. 300 Fed., 249.

Rule 94 U. S. D. C. for Idaho.

When a corporation comes into Court with an attack on the service of process, they must inform the party seeking service how a better service can be made and this information must come from some one authorized to speak for it.

Bushnell vs. Kennedy 76 U. S., 736.

Hill vs. Morgan 9th Ida., 718 76 Pac. 323.

*In tort action*—Interlocutory Judgment is necessary:—

City of Guthrie vs. T. W. Harvey Lumber Co., 50 Pac. 84.

Ross vs. Noble, 6 Kans. Appeal 361., 51 Pac. 792.

Haley vs. Eureka County Bank, 21 Nev. 127. 26 Pac. 64. 12 L. R. A., 815.

Creagh vs. Equitable Life Assoc., 88 Fed., page 1.

Boston & M. R. R. vs. Breslin, 297 U. S. 715 80 L. Ed. 1000 80 Fed. 2d, 749.

Existence of cause of action is determinable by law of State where injury occurs and the law of the State where the action is brought determines whether the action is *Joint or Several.*

Donaldson vs. Tuscon G. E. L. & P. Co., 14 Fed. Sup 246 (1935).

McFarland vs. B. F. Goodrich Rubber Co., et al, 47 Fed. 2d 44.

Watson vs. Chevrolet Motor Co. 68 Fed. 2d, 686.

Generally one must recover in tort action under law of place where tort was committed.

Geryer vs. Western Union Tel. Co. 93 S. W. 2d, 660.

U. S. vs. Pac. Forwarding Co. Ltd., 8th Fed. Sup 647 (Wash. D. C.)

Non-resident defendants cannot litigate part in State Court, and then remove to litigate another part, and the time for filing petition for removal is not tolled by filing motion to quash.

Miller vs. Troy Laundry Mach. Co. 2d Fed. Sup., 182.

Germania Ins. Co. vs. Wis. 119 U. S. 473 30 L. Ed. 461.

In a joint action against several non-residents defendants in which no separable controversy is presented, all of the party defendants must join in the removal. This is

true whether removal is sought on the ground of diversity of citizenship when no separable controversy exists, or because of Federal question involved.

Simpkins Fed. Prac. Sec. 1161.

Chesapeake & Ohio R. R. Co. vs. Dixon, 179 U. S. 121.

Again in action of tort which might have been brought against many persons or against anyone or more of them and which is brought in State Court against all jointly, contains no separable controversy which will authorize its removal, etc.

Jud.Code, Sec. 28 28 U. S. A. Sec. 71.

Torrence vs. Shedd 144 U. S. 530, 36 L. Ed. 531.

Forrest vs. Southern Ry. Co. 20 Fed. Sup 851.

Doubtful issues of law and fact must be tried in the court which had jurisdiction, and are not determined in removal proceedings.

Huffman vs. Baldwin et al, 82 Fed. 2d, page 5.

On removal of cause to Federal Court, Court takes case as it then is, and does not review rulings made by the State Court within State Court's jurisdiction while cause was pending in State Court.

McDonnell vs. Wasenmiller, 74 Fed. 2d. 320.

Duncan vs. Gegan et al., 101 U. S., 25 L. ed. 875.

Hoyt vs. Ogden Portland Cement Co., 185 Fed. 889.

After the denial by State Court to quash and set aside the service of summons and complaint, there can be no

renewal of the motion in Federal Court without leave to do so, either from State or Federal Court.

Allmark vs. Platte S. S. Co., 76 Fed. 615.

Where a foreign corporation is doing some substantial business in a State, and a suit commenced under the Statutes is removed, if the service was valid under the State law, Federal Court will not set aside the service.

Sleicher vs. Pullman Co. et al, 170 Fed. 365 (Applicable to Affidavits).

Hudson Navi. Co. vs. Murray 233 Fed. 466. (1916 C. N. J.).

A default admits the cause of action, and material and traversable averments of the declaration, although not the amount of damages.

Willson vs. Willson 57 Am. Dec. 320.

Slater vs. Skirving 66 Am. St. Rep. 444.

Appearance:—

The motion to quash in the State Court was a general appearance, notwithstanding the endeavor of defendants to limit it to a specialty.

R. S. Shaw vs. Martha Martin, 20 Idaho, 168 117 Pac. 853

State law governs as to what constitutes a general appearance

Hireen vs. Interstate Transit Lines et al, 52 Fed 2d 182.

Delaney vs. U. S. 77 Fed. 2d 916 (1935).

If the judgment be entered on failure to plead, or file an affidavit of defense, but the amount is undeterminable, the judgment is only interlocutory until the amount is determined.

Whitaker et al vs. Bramson Fed. Case No. 17, 526, 2d Paine 209.

Where a motion to set aside the service of process had been previously made and denied in the State Court, it was held that the Federal Court must follow such decision.

Hoyt vs. Ogden Portland Cement Co., 185 Fed., 889.

Whether an appearance is special or general, is determined by the relief sought.

C. J. Vol. 4. 1317,
Jenkins vs. York Cliffs Imp. Co. et al, 110 Fed. 807.
Crawford vs. Foster, 84 Fed., 939 28 CCA 576.
Mahr vs. Union Pac. R. Co., 140 Fed., 921. (Affirmed by 9th Circuit CCA), 170 Fed., 699.
Automatic Toy Corp. vs. Buddy "L" Mfg. Co. 19 Fed Sup 668. (NY 1937).

If a party wished to insist upon the objection that he is not in Court, he must keep out for all purposes except to make that objection.

Pittinger vs. Al G. Barnes Circus, 39 Ida 807.
Lowe vs. Stringham 14 Wis. 222.
Manning vs. Furr, 66 Fed. 2d. 807. (CCA).

The Courts, in an unbroken line of decisions, say generally that any action on the part of a defendant except to object to the jurisdiction over his person, which recog-

nized the case, as in court, amounts to a general appearance.

Hammond et al vs. Dist. Court of N. Mex. 228 Pac. 758.

Fowler vs. Continental Casualty Co., 17 N. Mex. 188, 124 Pacific, 479.

Dailey et al vs. Foster, 17 N. Mex., 377, 128 Pac. 71.

The defendants having filed their motion to set aside the default, therefore, entered and made a general appearance in this action.

Mandel Bros. vs. Victory Belt Co., 15 Fed 2d, 610 (CCA)

Feldman Investment Co. et al vs. Conn. General Life Ins. Co., 78 Fed. 2d, 838 (CCA).

If a defendant seeks to enter a special appearance and in his motion sets up further jurisdictional and non-jurisdictional grounds, it amounts to a general appearance, and the fact that it is denominated a special appearance in the motion avails nothing.

Nichols & Shepard Co. vs. Baker, 73 Pacific 302.

The pendency of a motion directed to the summons, complaint, or answer, shall enlarge the time to answer or demur, as the case may be, until the decision upon such motion and such time thereafter as may at the time of such decision be allowed; PROVIDED that, such be accompanied with a certificate of an Attorney of this court that he believes the motion well-founded in point of law, and that it is not interposed for delay.

Rule No. 25, U. S. District Court for the District of Idaho.

Hughes Fed. Practice, Section 12, 365.

Where a defendant in challenging jurisdiction on the ground of invalid process, or its services, goes further and raises an issue on the merits of the case stated in the bill, he thereby voluntarily waives the defects, if any, and enters his general personal appearance.

Foster Fed. Pract. 6th Ed., Section 1689.
Jones vs. Andrews, 10th Wall 327.
Hudson Navi. Co. vs. Murray, 233 Fed., 466

In a suit against a number of defendants, charged with having obtained property by fraud or conspiracy, such is not a separable controversy, and cannot be removed by one defendant, viz., (Manufacturers Trust Company).

McGowan vs. Williams et al, 10 Fed., Sup. 168 (1935).

A cause removed on the ground of separable controversy should be remanded at any stage at the instance of any party, or on the courts own motion whenever the absence of a separable controversy appears.

International & G. N. R. R. Co. vs. Hoyt, 70 S. W. 1012.

The erroneous assumption of jurisdiction in a removed cause may work serious hardship.

Fitzgerald vs. Missouri Pac. Ry. Co. et al, 45 Fed., 812 28 U. S. C. A. Sec. 344 B. (Jud Code 237.)

Every court has inherent power not depended upon the Statutes to control, vacate, or correct its own decrees in interest of justice.

Freeman on Judgments Sects. 200-222.

Ill. Printing Co. vs. Electric Shovel & Coal Corp. 20 Fed. Sup., 181, (Aug. 1937).

It is the duty at all times and at any time during the pendency of a suit to remand the case upon the fact appearing by affidavit or petition for removal, that the case has been improperly removed to the Federal Court.

Cameron vs. Hodges, 127 U. S. 322. —1154.
Rosebaum vs. Bauer, 120 U. S. 743.
Ayres vs. Wiswall, 112 U. S., 693.

Where a removed cause is taken to the Circuit Court of Appeals by Writ of Error, (Appeal now), it is the duty of the Court on its own motion to determine whether the record exhibits a removal cause, regardless of whether any objection was taken to the jurisdiction on the appeal.

Rife et al vs. Lumber Underwriters, 204 Fed. 32.
Fred Macey Co. vs. Macey, 135 Fed., 725.

Whether a District Court acquired jurisdiction of a cause by removal, until it sustained its jurisdiction by overruling, a motion to remand, cannot be determined by the appellant court on an appeal in ancillary suit.

Mestre, Atty. Gen et al vs. Russell, 279 Fed. 44.

III.

Whether the finding is general or special, the rules of the Court during the progress of the trial, if duly excepted to at the time and presented by Bill of Exceptions, may be reviewed.

Generes vs. Campbell, 11 Wall 193. 20 L. Ed. 110

While there is no appeal from an order to remand, a decision denying motion to remand is reviewable.

Houlton Savings Bank vs. Am. Laundry Machinery Co. 7 Fed. Sup 858.

Wrightville Hardware Co., vs. Hardware & Woodware Mfg. Co. et al. 180 Fed. 586.

Refusal to remand may be reviewed on appeal from final judgment.

Ruff vs. Gay 67 Fed 2d. 684.

Employers Re-Insurance Corp. vs. Bryant 299 U. S. 373.

Although a non-resident who was not personally served in the State Court could not be considered a party for the purpose of removal, this would not be grounds for dismissing the cause in the Federal Court, but only for remanding to the State Court.

Richmond vs. Brookings, 48 Fed. 241.

The Court having denied plaintiff's motion to remand to State Court, had inherent power during term to relieve plaintiff therefrom.

Leonard vs. St. Joseph Lead Co. et al 75 Fed. 2d, 390.

IV.

Process—Quashed:—

Where service of process issued out of Federal Court had been quashed because defendant was not within the territorial jurisdiction of Court, but dismissal of suit would prevent plaintiff from refiling suit within time permitted by State Statute to make service and decide issues.

28 Jud. Code, as amended, Sec. 27; 28 U. S. C. A. Sec. 71-80.

Employers ReInsurance Corp. vs. Bryant U. S. Dist. Judge., 299 U. S. 373. 82 Fed. 2d. 373.

Error committed—Suit was for conspiracy—by non-r esident, and was non-separable controversy, and was not removable by one defendant.

McGowan vs. Williams et al 10 Fed. Sup, 168.

The question of jurisdiction of the Circuit Court is properly presented in a case removed from State Court, where plaintiff's motion to remand on ground that case was not properly removed, is denied and final judgment is given against him on his opposing the jurisdiction and refusing to prosecute the action.

Powers vs. Chespeake & O. Ry. Co. 169 U. S. 673.

Again this duty to remand cannot be affected by the fact that there is no apparent cause of action stated, this is for the State Court to determine.

Broadway Ins. Co. et al vs. Chicago G. W. Ry Co. et al, 101 Fed., 507.

Ayers. vs. Wiswall 112 U. S. 187 28 L. Ed. 693.

Evidence received informally by affidavits and correspondence files, without production of witnesses, but without objection, must be considered on appeal.

Texas Co. et al vs. Borne Scrymser Co., 68 Fed. 2nd, 104.

The Court below cannot at the instance of a party, eliminate portions of the answers or pleas to the order that the transcript shall be made up without them in view of an appeal at law.

Smith vs. McIntyre et al, 84 Fed., 721.

But if the summons be quashed and another issued, or can be issued and a dismissal follows, the dismissal is a judgment and part of the record.

Teller vs. U. S., 111 Fed. 119.

*On appeal at law,* the Circuit Court of Appeals should dispose of all the questions and all of the controversies brought to it by the Appeal, in passing on such assignments of error as the appellant has the right to have reviewed all of the separable controversy in a removal case which were brought in with that on which removal was passed.

Maryland Casualty Co. vs. Jones, 73 L. Ed., 960, 27 Fed. 2nd, 521.

The construction of a state statute by the Supreme Court of the state with relation to the suability of a foreign corporation in the courts of such state will be followed by the Federal Court in such State, in determining the jurisdiction of the State Court of a suit under the Statute for the purpose of determining the question of its jurisdiction of the suit on removal.

Lightfoot et al. vs. Atl. Coast Line R. Co. 33 Fed 2d, 765.

Court, in a removal suit not rightfully in Federal Court, had positive duty to order remand.

Jud. Code, Sec. 37 U. S. C. A. 80.

Turmine vs. West Jersey and Seashore R. Co. 44 Fed. 2d. 614.

A district court's refusal to remand cause to the State Court if erroneous is revieable by Circuit Court of Appeal, ordinarily after final judgment, but also in connection with a reviewable interlocutory order.

Jud. Code, Sec. 37, 28 U. S. C. A. 71, 80.
Schell et al, vs. Food Machinery Corp. 87 Fed 2d, 385.

DISMISSAL:—

A dismissal of a case ordinarily stands on the same footing as a judgment at law, and will be presumed to be final and conclusive unless the contrary appears in the proceedings or decree of the court:

Durant vs. Essex Co. 7th Wall 109; 19 L. Ed. 156.
Fowler vs. Osgood v. L. R. A. (N. S.) 824.; 141 Fed. 24.

So, in all cases, when the objection does not go to the merits of the case, the judgment of dismissal should always be *without prejudice.*

Baker vs. Cummings, 181 U. S. 125; 45 L. Ed. 780.
American Surety Co. vs. Choctaw Const. Co. 135 Fed. 487.
Swan Land & Cattle Co. vs. Frank, U. S. 612. 37 L. Ed. 580.

When a bill is dismissed for want of jurisdiction, the court cannot decree costs.

Neel vs. Penn Co. 157 U. S. 153; 39 L. Ed. 654.
Citizens Bank vs. Cannon, 164 U. S. 324; 41 L. Ed. 453.
Westfeldt et al vs. N. Carolina Mining Co. 100 CCA 552. 177 Fed. 132.

Phoenix & Buttes Mining Co. vs. Winstead, 226 Fed. 863.

*ARGUMENT*

*Assignment No. 1*

*"That the Court erred in assuming jurisdiction of the cause in the first instance, on removal from the State to the Federal Court, and in denying the motion to remand."*

Under Judicial Code 28 amended, Section 71, and Judicial Code 29, Section 72.

The petition for the removal of the case from the State Court to the United States Court, was presented and the State Courtgiven an opportunity to act. The right to remove a suit from a State Court to the Circuit Court of the United States is statutory and to effect a transfer of Jurisdiction, all the requirements of the statute must be followed. The purpose of the Statute is that the adverse party shall be advised of the intention to file such petition and bond in order that he may have an opportunity to appear in the state court and resist its removal, if he so desires Appellant most vigorously protested at the hearing, (Tr. R. 22), and we believe now, that it is very apparent that error was committed, and the district court of the United States did err in assuming jurisdiction. Court then, for the sole purpose, should have heard and remanded the case immediately.

Lee vs. Continental Ins. Co., 292 Fed. 408.

Where a foreign corporation is sued in a state court, moved to quash the service of summons and complaint on

the ground that it was not doing business in the state, and the process was not served on an agent representing it in its business, and submitting affidavits in opposition to the return of the service, establishing prima facie evidence of legal service, the decision of the State Court that it acquire jurisdiction over the foreign corporation by reason of the service, was conclusive on the corporation, and it could not re-litigate the question in action in the Federal Court on the subject rendered against it by the State Court.

It is well settled by the statute providing that a motion to quash service of summons and complaint is deemed a general appearance. Appellees in their motion to quash in the prayer thereto, particularly moved *that the purported summons and complaint on defendant, Manufacturers Trust Company be quashed,* (Tr. -R. 21.).

After submitting the case to the state court and securing an adjudication on the validity of service of process, it was to late to remove the case, and the United States District Court should have remanded it.

Seager vs. Maney, 13 Fed. Sup. 617.

In the same case, this language is used. The record or a copy thereof is now filed in this court, and the defendant has petitioned this court to set aside the service made on defendant. The defendant is therefore asking to have this court pass upon questions which the Court of Common Pleas of Bradford County has adjudicated. One of the purposes of the Federal Removal Statute, Judicial

Code, Section 29, 28 U. S. C. A., Section 72, is to avoid such a situation as this, by requiring a removal petition to be filed before *any defense* is made in the state court so that the federal court has the entire un-adjudicated case before it, and can adjudicate every part of the case in the same manner, as if it had been originally commenced in the federal court; for on removal of cause into the federal court, that court takes it precisely as it receives it, accepting such decrees and orders of the state court as adjudicated, and will not entertain a motion which has been fully presented and finally decided by the State Court before removal.

Guernsey vs. Cross, 153 Fed. 827.

The State Court has right to pass on the sufficiency of petition and bond for removal to Federal Court. The giving of notice of intention to remove, is only for the purpose of giving the court, and parties to the suit, an opportunity to examine the sufficiency of the petition and bond, and does not operate as a transfer of jurisdiction from the State to the Federal Court.

28 U. S. C. A. Sec. 72; Notes 302-325-326-371.

In no case can the right of removal be established by a petition to remove, which amounts simply to a traverse of the facts alleged in plaintiff's petition, and in that way undertaking to try the merits of a cause of action good upon its face.

Thompson vs. Pan-American Petroleum Corp. 169 S. E. 270.

It is obviously not the purpose of the removal statute to destroy a valid jurisdiction of the state court, nor is it the purpose to secure to a defendant the right to litigate in the district of his own domicile, since the removal must be to the United States Court for the District wherein the suit was begun. A removal cannot be effected unless all the parties of the controversy unite in the petition, and it was the state court's duty to examine not only the petition, but the rest of the record in determining whether a sufficient case was presented for removal,

Missouri K & T R. R. Co. vs. Chappell, 206 Fed. 688.

Nor, can the removal statute be so construed as to permit a defendant to oust the rightful authority of a state court by removal, and then obtain a dismissal of the action in the federal court for want of jurisdiction.

Wells vs. Clark, 136 Fed 462.

If the State Court had properly acquired jurisdiction in a method authorized by law, (State Law,) and not repugnant to the Federal Constitution, or laws, or natural justice, the federal court on removal will recognize such jurisdiction and the process by which it was obtained.

In Crowley N. P. R. R. Co., 159 U. S. 583; 40 L. Ed. 263, the principal which was clearly stated; the case having been removed to the federal court upon the defendant's petition, it does not lie in its mouth to claim that the court has not jurisdiction of the case unless the court from which it was removed had no jurisdiction.

The Idaho Statute under which service was made, is as follows:

> "Section 5-507, Sub. 3, whenever any foreign corporation, not a resident, a joint stock company, or association, shall not have any designated person actually residing in the country in which said corporation or joint stock company shall be doing business in this state upon whom process can be served as provided in Sec. 29-502, of the Code, or when the agent of such Company as provided in the said Section, shall have removed from, or ceased to be a resident, or cannot after due diligence be found within the county where the action arose, or conceals himself in order to avoid the service of process, then service of such summons shall be made upon the County Auditor of said County, with like effect as though said service were made upon an agent or person appointed and designated as provided in Sec. 29-502, and it shall be the duty of such Auditor to forward a copy of such summons so served on him, by registered mail, to the principal business office of such corporation, in this State, if the address of such office be known to him, but no failure on the part of such Auditor to mail such copy of summons shall effect the validity of the service thereto."

In the instant case, the service was obtained on the Auditors of both Ada and Gem Counties, respectively. The service upon thecorporation was sufficient and so recognized by it, in admission of the service as by the Transcript of the Record, at pages five to eleven, incl. is shown, and by the appearance of the Attorneys for the defendants in court.

A similar statute in the State of Louisana directed, all foreign corporations doing business in the State to ap-

point an agent upon whom process should be served, and provided that if the corporation failed to make an appointment, service might be made upon the Secretary of State. The defendant not having appointed any such agent, Simon served his process on the Assistant Secretary of State in an action arising upon a tort of the defendant committed within the State of Alabama. The ground of the decision was that the consent of the corporation arose from its doing business within Louisiana, must be limited to actions arising out of the business done within the State. The same rule was laid down in Old Wayne Life Assoc. vs. McDonough, 204 U. S. 8; 51 L. Ed. 345.

Where a non-resident defendant invokes the judgment of the state court by motion to set aside the service of summons and complaint, he is concluded by the court's decision, and cannot renew the motion in the Federal Court.

Bragdon vs. Perkins-Campbell Co. 82 Fed. 338.

The right of removal is purely statutory and one seeking the benefits of the statute must comply with its essential provisions. A notice of intention to remove is the first step in the procedure, and pleading in some form is the last. The requirement to plead may not be mandatory or jurisdictional in the sense that it may not be waived by the parties or extended by the court; but it is an essential step necessary to be taken by the defendant before the cause shall then proceed in the same manner as if it had originally been commenced in the U. S. District court. There has been no such extension or waiver here.

The courts say whether to allow the defendant to plead

after the expiration of thirty days, or to remand the cause, is a matter that calls for the exercise of a sound legal discression; wherefore, it is that the statute may not be disregarded with impunity, and failure to comply with it without any satisfactory excuse, renders the cause subject to remand.

Wena Lumber Co. vs. Continental Lumber Co. 270 Fed. 795.

Again, a case involving but single controversy cannot be removed.

Ex-parte Wisner, 203 U. S. 449.

In the case of Watson vs. Chevrolet Motor Co. of St. Louis, 68 Fed. 2d 686, th court says:

> "Where the complaint in an action of tort, reasonably construed, charges concurrent negligence, the controversy is not separable, the question is to be determined by the condition of the record in the State Court where the removal petition is filed; the cause of action is whatever the plaintiff, by his pleading, declares it to be; and matter of defense furnish no grounds for removal."

Judge Cooley in his work on Torts, Third Ed. 247 says:

> "The weight of authority, will, I think, support the more general proposition that where th negligence of two or more persons concur in producing a simple, indivisable injury, then such persons are jointly and severally liable, although there was no common duty, common design, or concert of action."

That the Manufacturers Trust Company, was at all times cognizant of everything that was being done, by its

agent or trustee, Alexander Lewis, joint defendant, there can be no doubt, and that there is just a joint tort, can neither be questioned. The case however, was removed upon the petition of the Manufacturers Trust Company alone, (Tr. -R 13-14-15-16).

The *Motion to Remand* of plaintiff-appellant, was filed on March 30, 1937, (Tr. R. 31-32-33), supported by affidavits of James Baxter, Firmin J. Arnould, J. W. Crowe, Lillian M. Campbell, Auditor of Gem County, and Truman Joiner, supporting facts on the position taken by appellant, that the corporation was doing business within the State.

On April 15, and before said Motion to Remand was presented, Attorneys for defendant filed an amended bond for the Manufacturers Trust Company, Appellee, and in effect, conceded the discrepancies and deficiencies pointed out by appellant on his Objection to Allowance of Petition for Removal, (Tr. -R.22). At this point, it may be observed, that the authorization to the Attorneys for appellee to sign any bond in its behalf, was not made in New York until March 2, 1937, so that no valid bond had, or could have been filed when the time to plead by appellees had expired, which was February 28, 1937, (Tr.-R. 26-27). The presentation of a proper petition and bond to the State Court is a jurisdictional pre-requisite.

Wm. Stone vs. South Carolina 117 U. S. 430; 29 L. Ed. 962.

All these matters were presented in the Motion to Re-

mand, in the first instance, to the court, and which Motion to Remand, the Court denied and immediately thereafter, the plaintiff renewed his motion and again the same overruled.

Upon the Renewal Motion to Remand of April 27, 1937, the plaintiff particularly stressed the point that not all of the defendants had joined in the removal, and that more than thirty days had elapsed and no pleading, answer or demurrer to the declaration or complaint having been filed as provided by statute, Jud. Code, Section 29, Compiled statute, Sec. 1011, and as amended, (Tr. -R.49).

After the removel and the filing of the Transcript in the U. S. District Court, it was the duty of the defendants to plead, answer or demur within 30 days to the declaration or complaint, at which time the cause should then proceed in the manner as if originally commenced in the Federal Court. No pleading, however, of any kind, or answer was ever filed by the appellees, and on June 2, 1937, the plaintiff-appellant took a Default, and on July 6, 1937, filed a motion to make the Default final, by reason of no answer, plea, or demurrer, or Affidavit of Defense, (Tr.-R. 54-55).

*Assignment No. 2.*

*The Court erred in his judgment of October 5th, 1937, in setting aside the default of defendant, Manufacturers Trust Company, and in quashing the service of summons and complaint in the action.*

On August 6, 1937, more than sixty days after the Default entered by the appellant, the appellees came into court and filed two separate motions to set aside the default, (Tr. R. 55-56-57-58-59-60-61-62-63-64). These motions were sworn to by the Attorneys for the appellees and sought again in their motions to appear specially. The state law of Idaho governs as to what is a special appearance.

In the case of Pittinger vs. Al. G. Barnes Circus, 39 Idaho, page 807, the courts say: The rule to be observed by a defendant relying upon a special appearance to attack the jurisdiction of the court is well stated in Lowe vs. Stringham, 14 Wis. 255, where the court said: "If a party wishes to insist upon the objection that he is not in court, he must keep out for all purposes, except to make that objection."

In the case of Mahr v. Union Pacific R. R. Company, 140 Fed. 921, this was a case tried in the Federal Court for the District of Washington and the decision therein was affirmed by the Circuit Court of Appeals for the Ninth Circuit; in this case the same procedure was followed as in the case now before this court. In the Mahr case the defendant filed its motion to quash the service of summons, and the plaintiff filed its motion for a default judgment, and the court here says "As the decision of one, must conclude the other, the two motions will be considered together." Again upon the question of the special appearance in that case the courts say on page 923 as follows:

"The right to make a special appearance in not a substantial one inherently existing; it is a privilege allowed by practice, and it must be exercised under the rules of procedure. Whenever a litigant appears to deny jurisdiction over his person, which would otherwise exist but for the failure to pursue the methods prescribed by law for-bringing him into court, he must confine himself to that particular branch of jurisdiction. It is a matter of indifference to him whether or not the court has jurisdiction over the subject-matter; so long as it has no jurisdiction over his person, it cannot in any injuriously affect his interests. He must therefore, be content to stop with the suggestion that the summons or notice, as the case may be, required by the law to be served, has not been served, and that the court is therefore not entitled to deal with him in the absence of such service. As to whether the court has jurisdiction over the matter embodied in the complaint, he need give himself no concern. If he does, in a transitory action, and enters upon a discussion of that question or makes a challenge as to that point, he waives the want of service and enters voluntarily into a controversy which goes to the merits, and thereby submits to the jurisdiction of the court over his person."

In the motion filed by defendant and above referred to the relief asked was that this court should quash the summons and complaint filed in this action. They did not ask the court to quash the SERVICE of summons and complaint. There is a vast difference between quashing the service of a summons and complaint and quashing the complaint and summons itself. In order to quash the complaint in this action the court would have to assume jurisdiction and decide whether or not there was any legal reason that the summons and complaint should be

quashed. As far as the complaint is concerned, in our opinion, a move to quash the same is practically the same as filing a demurrer thereto, and to quash the summons the court would have to take jurisdiction and examine the summons and see if it was issued in legal form and complied with the laws regarding the same.

If, as we contend, the defendant has made a general appearance in this action, then it is of no consequence whether or not the defendant was doing business in the State of Idaho at any time, or at all, and it is also immaterial whether or not there was any legal servicet or any service at all of the summons and complaint in this action upon the defendants.

The defendant in its said motion to quash, herein referred to, further states as follows "This motion is based upon the records and files in this action, including this motion." The defendant, the court will notice, does not limit itself only to the consideration of those papers in the record which are necessary to be considered in passing upon the question raised by its motion to quash, but it invites the court to consider all the records and files in the action which in effect opens up the whole case for the consideration of the court. (Tr.-R. 64).

Again in a recent case to wit: In Manning vs. Furr 66 F. 2nd 807 (CCA) the court says, "It is true that the defendant undertook to appear specially for the purpose of challenging the service of summons upon him, but in addition to these grounds he included the ground of

'other matters apparent on the face of the record'. The 'other matters' there referred to must necessarily apply to matters in addition to those stated in relation to the service of summons upon him. Such an assignment searches the entire record. It may serve as a general demurrer to the bill of particulars, also as a challenge to the jurisdiction of the court. As a consequence of this, it must be held that the defendant entered his appearance to the merits of the case. In the above case the court also states "It is elementary that: 'A defendant appearing specially to object to the jurisdiction of the court must, as a general rule, keep out of court for all other purposes. In other words, he must limit his appearance to that particular question or he will be held to have appeared generally and to have waived the objection' ".

The motion to quash the writ or service, whatever the cause, should go no further than raise the special objection to the form of the writ or irrigularity of the service.

American Gasoline Co. vs. Commerce Trust Co. 20 Fed. 2nd 46 (CCA).

The Courts in an unbroken line of decisions say, generally that any action on the part of a defendant except to object to the jurisdiction over his person, which recognized the case as in court, amounts to a general appearance:

Hammonds vs. Dist. Court, 228 Pac. 758.

Fowler vs. Cont. Casualty Co., 17 N. Mex 188; 124 Pac. 479.

Guadalupe County vs. District Court, 223 Pac. 517.

And whether an appearance is special or general, is determined by the relief sought.

4 Corpus Juris, 1317.

Crawford vs. Foster, 84 Fed 939; 28 (CCA) 576.

M. & H. Ry. vs. Union Pacific Ry. Co., 140 Fed, 921. (Affirmed by 9th Circuit, CCA, 170 Fed 699).

Under the rules of practice in the Federal District Court, the pendency of a motion directed to the summons, complaint, or answer, shall enlarge the time to answer or demur, as the case may be, until the decision upon such motion and such time thereafter as may at the time of such decision be allowed; PROVIDED that such be accompanied with a certificate of an Attorney of this court that he believes the motion well-founded in point of law, *and that it is not interposed for delay.*"

Rule No. 25, U. S. District Court for the District of Idaho.

Hughes Fed. Pract., Sec. 12,365.

If this rule means what it says, then there is no alternative but the Court should have over-ruled the motion of the defendants in the first instance for the reason that there is no Certificate of an Attorney of this Court, that he believes the motion well founded in point of law, and there is no affirmative showing that it is not for the purpose of delay, and of which the defendants may be rightfully accused, as this case has been before the Honorable Court one year and no showing by the defendants

at any time has been made, setting up a valid defense or any defense at all.

See Rule No. 25, Transcript of the Record, page 154.

The Coupling with a special appearance and objection to the merits raises it to a general appearance and overrules the special appearance.

In Dana vs. Seabright, 47 Fed. 2nd 38, the Court said where a defendant in challenging jurisdiction on the ground of invalid process or its service, goes further and raises an issue on the *merits of the case stated in the bill,* thereby voluntarily waives the defects, if any, and enters his general personal appearance.

In a suit against a number of defendants charged with having obtained property by fraud or conspiracy, such is not a separable controversy, and cannot be raised by one defendant, (as in this instance); and a cause removed on the ground of separable controversy, should be ermanded at any stage, at the instance of any party, or on the court's own motion, whenever the absence of a separable controversy appears; and we believe the court erred.

International & G. N. Ry Co. vs. Hoyle 149 Fed, 180.

The erroneous assumption of jurisdiction in a removed cause may work serious hardship, (as in case at bar). Every court has inherent power not depended upon the statutes, to control, vacate, or correct its own decrees in the interest of justice, and it is the duty at all times, and at any time during the pendency of a suit to remand the

case upon the fact appearing by Affidavit, or Petition for Removal, that the case has been improperly removed to the Federal Court.

Cameron vs. Hodges, 127 U. S. 322.

Rosenbaum vs. Bauer, 120 U. S., 30. L. Ed. 743.

A court has jurisdiction to render a valid judgment against a corporation of a foreign state whenever the corporation appears generally by Attorney, or when legal service has been made upon it according to the laws of the state where the court sits.

March vs. Eastern Ry. Co. 40 N. Ham. 548; 77 Am. Dec. 732.

Boise Flying Ser. Incorp. vs. Gen. Motors Acc. Corp. 55 Ida. 5.

We believe that the default entered on June 2, 1937 was properly taken if the case was properly removed into the Federal District Court by defendants-appellees. If, however, the fact that no proper bond or any bond was filed; and if appellees by their motion, challenging the jurisdiction of the State Court was not a general appearance; and if it was not necessary for the appellees to plead, answer or demur, having removed the case to the Federal Court within thirty days, according to rule; then, we think, the default was improperly taken and the court had a right to set aside the default judgment; but it was error to quash the *summons and the complaint* which the court did after considering the record and files in the case in which necessarily he must have, and did consider matters other than in relation to the service of summons.

While it is true that the appellees challenged the service of summons and complaint, and by every inference that may be gathered from the entire procedure in the case, from the motion to quash in the state court, to and including the final appearance, over objection of counsel on the motion to remand on June 11, 1938, it is evident that they appeared generally. We rever again t the case of Mahr vs. Union Pacific Ry. Co., Supra.

The inconsistancy of the appellees in their contention, is so apparent when considering the Law on Procedure.

If the State Court, as appellees contend, had no jurisdiction, it could not have passed upon the question of removal, and the case could not have been removed.

Cyc. Fed. Pro. Vol 1, Section 72.

And as said, the Federal Court takes only such jurisdiction, had and so acquired, and takes no jurisdiction if the State Court had none.

Wm. Stone vs. State of South Carolina, Supra.

Yet, in their motion of August 6, appellants recite, "That this Honorable Court has never acquired jurisdiction of the specially appearing defendant as appears from the motion to quash the service of summons and complaint on file herein," (Tr.-R. 57). And in their companion motion, (Tr.-R.64), for Alexander Lewis, "This motion is based upon the records and files in the action including the motion."

A defendant not served, and who appears specially in the Federal Court after removal, but filed a demurrer, and

numerous special exceptions and plead to the merits, held to have waived objections to the jurisdiction over his person;

Norris Ins. Co. vs. M. H. Reed & Co. 278 Fed. 19; 237 U. S. 19.

And on the motion of August 6, to set aside the default sworn to by the Attorneys of record for appellees, in each instance, they plead to the merits of the case and have waived objections to the jurisdiction.

The Judge of the United States District Court in his Opinion of October 5, 1938, particularly refers to the filing of the special appearance by the defendants in their motion to quash states: "The mere fact that the State Court entertained the Order or Removal, it did not by so doing, decide the motion of the defendant, Manufacturers Trust Company, to quash the service etc." It must be remembered that the defendants filed their motion to quash the service before a valid bond was filed and therefore the removal was not made before time to answer expired, and this fact is further evidenced by the opposition Objections to Allowance of Petition for Removal, (Tr.-R.22), and the Corrected Minutes of the Court, (Tr.-R.29). The hearing wason March 4, several days after time for answer had expired, and bond could not have been made or filed since authority to sign was not given until March 2, 1938, and that was in New York.

The United States District Court, however, denied the Motion to Remand, which left the case in the Federal Court with the service of the Summons quashed and the

Complaint as well. On October 21, immediately after the rendering of Option, and the filing of exceptions thereto; counsel for appellant filed his "MOTION TO RECONSIDER ORDER OVERRULING MOTION TO REMAND," as is more particularly set out in (Tr.-R. 75-76), and supported further by the Affidavit of Robert W. Clark, which was filed, (Tr.-R.77-78-79).

The Court denied the Motion for Reconsideration on January 5, 1938, and on February 7 and 8, 1938 and March 16, respectively, another summons was issued from the Federal Court, and the same served upon defendant, Manufacturers Trust Company, through the Auditor of Gem County, Idaho, (Tr.-R. 81 to and including 92); and again on March 23, the defendant through its Attorneys, filed a motion to Quash Service of Summons and Complaint. Appellant, then, filed notice to take up and determine said motion, and again filed a Motion for Default by reason of the defendants *failure* to *answer* or *plea* to the plaintiff's complaint filed, and for want of sufficient Affidavit of Defense. (Tr.-R. 96-97-98).

*Assignment No. 3.*

*The Court further erred in denying the motion of plaintiff filed on the 11th day of June, 1938, to remad said action to the State Cour t of the Third Judicial District of the State of Idaho, in and for Ada County from which it was removed for trial.*

By referring to the Affidavit on file it is shown beyond

cavil that the MANUFACTURERS TRUST COMPANY has done business and is doing business in the State of Idaho even until now. If then, it is doing business, and as set out by the Martial's retnrn, "That it is a foreign corporation and has not complied with the Constitution and Laws so made and provided, relative to foreign corporations, doing business in the State of Idaho, andthat the said corporation is conducting a mining business in Gem County, State of Idaho, etc," the service required under the Statute was properly made, and when made at the instance and order of this Court upon the Auditor of Gem County, and as is supported by her Affidavit on file, it was amply sufficient

POWER—RESULTING TRUST—TITLE:—

Through this entire case there has appeared a salient effort by the defendants in which they deny responsibility for their acts, and it may occur to the Court that a situation arises by reason of the dereliction of the parties themselves, which may result in law creating a "naked power" in ALEXANDER LEWIS, and then again, it may create a resulting trust.

If the affidavit of James L. Fozard contains any truthful statements, pertaining to the acquirement of the mining property, in the first instance, and we believe it may be conceded that the MANUFACTURERS TRUST COMPANY, did in the inception of the negotiations in 1923, pay the purchase price and was the rightful owner, and at the time took the title in the name of their em-

ployee, ALEXANDER LEWIS, that a simple dry trust was created and the nature of the trust in not being described in the muniment of title, the deed, from Hutchings and Richards to Alexander Lewis, left the same to construction or law. In such a case cestui que trust is entitled to the actual possession and enjoyment of the property, and to dispose of it, or to call upon the trustee to execute such conveyence of the legal estate as he might direct. In short, the cestui que trust has an absolute control over the beneficial interest, together with a right to call for the legal title and the person in whom the legal title vests, is a simple or dry trustee.

Perry on Trusts, 5th Ed. Sec. 520, says: "Settlors sometimes convey estates in this manner for an ulterior purpose, or an active trust having been accomplished, the legal title andthe beneficial interest may have fallen into this condition. The duties and powers of such dry trustees of the legal estate are few and simple. They're usually to be threefold: First, to permit the cestui que trust to occupy and receive the income and profits of the estate; Second, to execute such conveyance or make such disposition of the estates as the cestui que trust may direct; Third, to protect and defend the title or to allow their names to be used for that purpose. In a simple trust of this nature, the dry trustee has no power of managing or disposing of the estate. It is further to be remarked that there can be but few of these dry trusts, for where there is no control and no duty to be performed by the trustee, it becomes a simple use, which the Statute Of

Uses executes in the cestui que trust and it thus unites both the legal and beneficial estate.

Referring to the deed of Hutchings and Richards to Alexander Lewis, it will at once be seen that a trusteeship was contemplated for the benefit of the corporation, Manufacturers Trust Company, and that the interest of Alexander Lewis was a naked power. Deed, (Tr.-R. 105 to 110), also the Affidavit of James L. Fozard, (Tr.-R. 121 -to 125).

Corporations are creatures of the law, and they cannot exercise powers not given them by their Charters or Acts of Incorporation for this reason: They cannot act as trustees in a matter in which they have no interest or in a matter that is inconsistent with, or repugnant to the purpose for which they were created; nor can they act as trustees, as they are forbidden to take and hold lands unless complying with the Statutes and Laws in the State in which they seek to acquire the same; and as said in the Donaldson Case, 29 Idaho 754, from the Syllabus, Sec. 10 of Art. 11 of the Constitution, and Sec. 2792 of the Revised Codes, as amended, Session Laws 1915, 270, prohibits the taking of title *by an agent of a foreign corporation, in his own name,* and for and on behalf of such a corporation, or a trustee appointed by such corporation for that purpose, as effectively as it prohibits the corporation itself from taking such title. This absolutely prevented theManufacturers Trust Company, through its trustee, or by itself, to convey title of any kind to a cor-

poration to property in this state and equally prevented the Holding Company from receiving title and as shown in the Affidavit of William I. Phillips, quoting the testimony of J. Lawrence Gilson, Vice President of defendont, Manufacturers Trust Company, on page 103 of the Transcript, "Patents were applied for in the name of Alexander Lewis, but were actually for the benefit of the Manufacturers Trust Company; and all expenses and costs were paid for by the Manufacturers Trust COMPANY *was the real party in interest.*"

On May 5, 1938, the Honorable Court in his Opinion stated the sole question remaining for decision on the motion to quash service of summons and complaint, as the other questions presented at the same time were disposed of from the bench, is, "Was the Manufacturers Trust Company organized under the laws of New York, doing business in the State of Idaho when the attempted service was made on February 5,, (should have said March 16, 1938), upon the Auditor of Gem County?" It seems in this particular that the court had in mind that in order for service to be effectual, the corporation must have been doing business at the time of the service. Of course, this assumption is incorrect, the theory is that the corporation transacted business within the State and committed the tort, though it had not complied with the Laws of the State relative to doing business within the State, if it had entered the State without complying with the provision of the law, it will be deemed to have assented to any valid terms prescribed by the commonwealth as a

condition of its right to do business there; and it will be estopped to say that it had not done what it should have done in order that it might lawfully enter the commonwealth and there assert its compliance.

In Baltimore & Ohio Ry. Co. vs. Harris, 12 Wall 65 the question was as to the jurisdiction of the Supreme Court of the District of Columbia in a suit against a corporation in Maryland, whose railroad entered the District without consent of Congress. This court said, "The corporation cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be procured by the law of the place. One of these conditions may be that it shall be sued, and if it does business, it will be presumed to have assented, and will be bound accordingly. A foreign corporation cannot do business in Idaho without subjecting itself to the jurisdiction of our courts, but it is not a necessary corollary that it is entitled to claim a residence. In addition, it cannot escape the consequences of an illegal act done by its agents within the scope of the authority, conferred upon them by claiming existence under a foreign government. It is laible to be sued here, the same as an individual or company incorporated under the laws of the State.

Austin & Wife vs. R. R. Ry. Co., 25 N. J. L. 381.

By referring to the record, and the exhibits in evidence to wit: The deed, the death certificate of Alexander Lewis Exhibit No. 5, (Tr.-R. 99), and the Checks, Exhibits Nos. 1, 2, 3, and 4, (Tr.-R. 110-111-112-113); it

will be seen that the appellee, through its *dry trustee,* Alexander Lewis, was doing business, and receiving the revenue therefrom, as alleged in plaintiff's complaint, and that its officers resided without the State of Idaho.

Garrett vs. Pilgrim Mines Co. 47 Idaho 595; 277 Pac. 567.

*Assignment No. 4.*

*And the Court erred in dismissing the action on June 13, 1938, after the Statutes of Limitation, preventing the filing of a new action had run, thereby depriving plaintiff of enforcing his demands against defendants.*

Referring particularly to the defendant, Alexander Lewis, not being served in the second instance by the process issued from the Federal District Court, for the very reason that the defendant was dead, yet no suggestion of such fact was made by Attorneys for Appellee, defendent Lewis, having died September 4, 1937, (Tr. R. 99).

Although a non-resident who was not personally served in the State Court could not have been considered a party for the purpose of removal, even that would not be sufficient grounds for dismissing the case in the Federal Court, but only for remanding to the State Court.

Richmond vs. Brookings, 48 Fed. 241.

The Court having denied plaintiff's motion to remand to the State Court had inherent power during the term to relieve plaintiff therefrom. Having quashed the services of the summons and complaint in the State Court, and having refused to remand the case at least three times

upon motion, and having ordered a summons and complaint served upon defendants from the Federal District Court, he had inherent power in the last instance to remand the case to the State Court from which it had been removed erroneously and where services of process issued out of Federal Court has been quashed because defendant was not within "Territorial Jurisdiction" of the court, it was not only plaintiff's right to have the case remanded it; and especially so when as in the specific case the court was informed that the Statute of Limitations had about expired and that a refiling of a new action within the time permitted by Statute could not be made, the Court erred *in dismissing the case,* instead of remanding to the State Court which had jurisdiction to parfect service, and decide issues.

Ruff vs. Gay 67 Fed. 2nd 684.
Leonard vs. St. Poseph Lead Co. 75 Fed. 2nd 390.

A very late and instructive case, parallel to the one at bar, in re: Employers Reinsurance Corp. 82 Fed. 2nd 373; 299 U. S. 325, we quote, "*Quashing of service of process, issued out of Federal District Court, because defendant was not within territorial jurisdiction of court, did not require dismissal of action where court had general jurisdiction.*"

"*Where service of process, issued out of Federal District Court had been quashed because defendant was not within territorial jurisdiction of court, but dismissal of suit would prevent plaintiff from refiling suit within time permitted by state statute, court properly remanded case to state court having jurisdiction to make service and decide issues.*"

Jud. Code, 27 as amended; Sec. 27; and 28 U. S. C. A. 71, 80).

Section 80, title 28 U. S. C. A.

"If in any suit commenced in a district court, or removed from a State Court to a district court of the United States, it shall appear to the satisfaction of the said disrict court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the Court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

"The quashing of service did not require a dismissal as the court had general jurisdiction of the case. Conceding that process of the court could not run out of the district, with the quashing of the second service, the court *was without power to enter judgment.* Upon remand, the state court, under the law of Texas would have authority to make service anywhere in the state and jurisdiction to decide the issues. If the suit were not remanded, plaintifi would never be able to *enforce his demand,* no matter how just, without the voluntary appearance of defendant. The actions of defendants so far indicate no intention of ever voluntarily appearing. *The federal court may not be used to perpetrate an injustice."*

At this point we wish to call the courts attention that on hearing of the final motion to remand, after the case had been pending in the Federal Court for over a year and

three months, during which time the defendants-appellees had filed no demurrer or answer, but in each instance objected to remanding the case, and the court not acting otherwise, placed the appellant in a very pecular and precarious position. He could not dismiss the case of his own motion, and protect himself by re-filing a new action in the State Court, or the Federal Court, and he could not proceed. He did, however, in each instance upon the hearing of the court, and ruling therein, reserve his exceptions, as the record will show, and filed his bill of exceptions which included affidavits and entire records and files in case, which court had considered, and are the Record. (Tr.-R. 47-52-73-80-130 & 131-135).

Rule 94 of the United States District Court, (Tr.-R. 157), was called to the courts attention several times, and in the finalty ,as appears by the Transcript of the Record, 134; the *final order, and judgment was made which we believe was error*s

At the hearing, counsel for appellant objected to the appellees appearing in opposition to the final motion, and to their argument, for the reason, as he maintains, they were not further concerned, and were no longer before the court.

In re: Employers Reinsurance Corp. (Circuit Court of Appeals, 5th Circuit, Supra).

*Assignment No. 5.*

*And erred in rendering judgment for cost to defendants.*

A dismissal of a case stands on the same footing as a judgment at law, and will be presumed to be final, and conclusive, unless the contrary appears in the proceedings, or decree of court:

Durant vs. Essex Co., 7th Wall 109; 19 L. Ed. 156.

A district Court's refusal to remand cause to the State Court, if erroneous, is reviewable by Circuit Court of Appeals, ordinarily, after final judgment, but also in connection with a reviewable interlocutory order::

Jud. Code, Sec. 37; 28 U. S. C. A. 80.

Schell et al vs. Food Machinery Corp. 87 Fed. 2d, 385.

So, in all cases, when the objection does not go to the merits of the case, the judgment of dismissal should always be without prejudice.

Baker vs. Cummings, 181 U. S. 125; 45 L. Ed. 780.

Swan Land & Cattle Co. vs. Frank, 148 U. S. 612. 37 L. Ed. 580.

When a bill is dismissed for want of jurisdiction, the court cannot decree costs.

Citizens Bank vs. Cannon, 164 U. S. 324: 41 L. Ed. 453.

Phoenix & Buttes Mining Co. vs. Winstead, 226 Fed. 863.

Where it appears that the defendant in error procured the removal of the case from the State Court upon a record which fails to support the jurisdiction of the Federal Court, the judgment may be reversed with directions to

remand, and defendant in error will be condemned to pay the costs, both of the court below and the Appellate Court.

Neel vs. Penn Co. 157 U. S. 153; 39 L. Ed. 654.

In conclusion, we most sincerely urge, that the Circuit Court of Appeals, as stated in Maryland Casualty Co. vs. Jones, 297 U. S., 792; 73 L. Ed. 960, will dispose of all the questions and all the controversies brought to it by the appeal, and in passing on such Assignments of Error as the appellant has a right to have reviewed, per adventure the default judgment in the Federal Court may be re-instated, and if not, a reversal of the case be made in toto, and proper order.

Respectfully submitted,

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